Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

(2)

No. 96-1204

In The

Supreme Court of the United States

October Term, 1996

CARL PEASE,

Petitioner,

v.

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH P. MAZUREK
Attorney General of Montana
CLAY R. SMITH
Solicitor
HARLEY R. HARRIS
Assistant Attorney General
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406)444-2026

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTION PRESENTED

Does a tribal court have jurisdiction over a nonconsenting political subdivision of a State for the purpose of determining whether a state tax statute is preempted by federal law and enjoining its enforcement?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

A. States and Their Political Subdivisions Possess Common Law Sovereign Immunity From Suit in the Tribal Courts 6

B. An Immunity Rule Must Be Considered Implicit Within the Constitutional Structure in Order to Protect Congress's Plenary Powers, and the State's Sovereign Interests, From Being Frustrated by Actions Brought in Tribal Courts 9

1. Tribal Court Jurisdiction Over States Threatens to Frustrate the Constitutional Structure for Regulating Indian Affairs 11

2. Tribal Court Jurisdiction Over States Is Without Historical Precedent and Threatens to Frustrate State Sovereign Interests 15

CONCLUSION 19

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 37 (1996) 3, 5, 6

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 8

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) 10

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 13

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 12, 14

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 10, 13

County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 1, 2, 14

Duro v. Reina, 495 U.S. 676 (1990) 15, 16

Edelman v. Jordan, 415 U.S. 651 (1974) 7

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 17

Great Lakes Dock & Dredge Co. v. Huffman, 319 U.S. 293 (1943) 17

Hans v. Louisiana, 134 U.S. 1 (1890) 6

In re Greene, 980 F.2d 590 (9th Cir. 1992), *cert. denied sub nom.* Richardson v. Mount Adams Furniture Co., 510 U.S. 1039 (1994) 7

TABLE OF AUTHORITIES – Continued

Page

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 14

Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) 7

Lawrence v. Chater, 116 S. Ct. 604 (1996)..... 5

Lummi Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993) 2, 14

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 16

Montana v. Gilham, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed* (9th Cir. July 18, 1996) (No. 96-35766).....6, 7, 8, 9

Montana v. United States, 450 U.S. 544 (1981)..... 3

Nevada v. Hall, 440 U.S. 410 (1979).... 5, 9, 10, 11, 16, 18

New York v. United States, 505 U.S. 144 (1992)..... 16

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 11, 15, 16

Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985)..... 13

Owen v. City of Independence, 445 U.S. 622 (1980) 7

Pennhurst State Sch. v. Halderman, 465 U.S. 89 (1984) 7, 8

Regents v. Doe, 1997 WL 65561 (U.S. Feb. 19, 1997) 7

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 6

Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).. 6, 8, 13

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463 (1979) 6, 13

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 12

FEDERAL MATERIALS

United States Constitution

Amend. X 10

Amend. XI 7, 8

Articles of Confederation

Art. IX, ¶ 4, cl. 3. 11

United States Code

Tit. 25, § 349 2

Tit. 28, § 1341 17

Tit. 42, § 1983 17

Session Laws

41 Stat. 750. 1

MONTANA MATERIALS

Montana Constitution

Art. I. 2

Montana Code Annotated (1995)

§ 15-1-405 7

TABLE OF AUTHORITIES – Continued

Page

§ 15-1-406 7

§ 15-10-101 7

§ 15-15-101 7

§§ 15-16-101 to -803 7

OTHER AUTHORITIES

Prucha, Francis Paul, *American Indian Treaties* p. 69 (1994) 13

The Federalist No. 42 (James Madison) (Jacob E. Cooke ed., 1961) 13

Jackson, Vicki C., *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988) 17

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Yellowstone County, Montana ("County") hereby responds to the petition for a writ of certiorari filed herein.

STATEMENT OF THE CASE

In July 1991 Petitioner Carl Pease ("Pease") filed an action in the Crow Tribal Court seeking to enjoin the County from imposing state property taxes on his real property located within the exterior boundaries of the Crow Indian Reservation. Pease is a member of the Crow Tribe, and the property in question was allotted and patented in fee under the Crow Allotment Act of 1920 (41 Stat. 750) to Pease's father, also a Crow tribal member.[1]

The Crow Tribal Court issued a judgment and memorandum in March 1994 determining that the County lacked authority to impose the challenged taxes and enjoining it from issuing a tax deed or tax sale certificate. The court reasoned that, while *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251

[1] Pease alleges that his father "had been issued a fee patent despite the fact that he had never requested the land be removed from trust." (Pet. at 2.) Apart from being immaterial, this allegation is unsupported by the record. The only statement in the record relating to the manner in which the subject parcel came into fee ownership was a stipulation filed with the tribal court. That stipulation states no more than that ***"there is no record that*** [Pease's father] ever requested a fee patent to this land." (Opp. App. at 2) (emphasis added).

(1992), and *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), compelled the conclusion that in 25 U.S.C. § 349 Congress had removed any restriction against state taxation, the disclaimer provision in article I of the Montana Constitution established that Montana has never "accepted jurisdiction over fee lands on an Indian reservation" and that, "[u]nder the circumstances, Plaintiff's land is not subject to state taxation until the state acts to accept such jurisdiction." (Pet. App. at 38a.) The County appealed, and in June 1994 the Crow Tribal Court of Appeals affirmed on different grounds.

The Tribal Court of Appeals first rejected the County's contention that the tribal courts lacked subject matter jurisdiction over Pease's claim because "[a] careful examination of the extent that tribal sovereignty has been altered, divested or diminished as to the issue of the exercise of tribal court jurisdiction over an issue of state taxation of land located within the Crow Indian Reservation reveals no diminishment, divestiture or alteration is alleged to have occurred." (Pet. App. at 30a.) It then held that the Crow Allotment Act did not evince a clear congressional intent to remove the traditional prohibition against state taxation of tribal lands. (Pet. App. at 32a.) The Tribal Court of Appeals distinguished *County of Yakima* on the basis that "allotments made under the Crow Allotment Act are not governed by the General Allotment Act" and on the basis that Pease's claim did not involve townsites, which are "in a much different situation than land located on a portion of a reservation never under state authority as a townsite is." (Pet. App. at 31a-32a.) Unable to distinguish *Lummi*, the Tribal Court

of Appeals simply adopted the reasoning of that decision's dissent. (Pet. App. at 33a.)

The complaint in this matter requested the district court to rule that the tribal court's judgment was void because the Crow Tribal Courts lacked adjudicatory jurisdiction over the County.[2] In July 1995 the district court granted the County's summary judgment motion, holding in relevant part that the tribal court lacked adjudicatory authority over the County. (Pet. App. at 26a.) The court of appeals similarly rejected Pease's argument that there is a "meaningful . . . distinction" between tribal adjudicatory and regulatory authority (Pet. App. at 13a-14a, *citing A-1 Contractors v. Strate*, 76 F.3d 930, 938 (8th Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 37 (1996) (No. 95-1872)), and went on to hold that the tribal court lacked jurisdiction over the County under either of the "exceptions" identified in *Montana v. United States*, 450 U.S. 544, 565-66 (1981). As to the first – or consent – exception, it concluded that the Crow Allotment Act "did not constitute a consensual commercial agreement." (Pet. App. at 18a.) With respect to the second exception the court explained that "Pease's speculation concerning

---

[2] The County also initially asked the district court to rule on the merits of the tribal court's determination that the involved state property taxes were preempted by federal law. It later withdrew that request based on its belief that Pease's defenses to his tax liability were more properly resolved in state administrative and judicial proceedings and because, as a usual matter, federal district courts lack jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

future foreclosures [of tribal member-owned land] is insufficient to constitute the requisite imperilment." (Pet. App. at 18a-19a.) Because it had held for the County on this basis, the court of appeals declined to address the County's sovereign immunity argument. (Pet. App. at 19a, n.8.)[3]

SUMMARY OF THE ARGUMENT

Pease's suggestion that the Court "grant, vacate and remand" should be rejected because *Strate* is not necessarily dispositive of this case. While it is true that the Ninth Circuit relied on the Eighth Circuit's decision in *Strate*, the County possesses another meritorious argument which the Ninth Circuit did not address and which is sufficient by itself to sustain the decision below without regard to the questions presented in the petition or in *Strate*.

The County, which with respect to the matters at issue in this case is acting as an arm of the State of Montana, possesses and is entitled to assert the latter's common law sovereign immunity as a defense to an action brought against it in a tribal court. The State's common law immunity has a well established basis in the law and, as between the State and an Indian tribe, has not

[3] Pease raised two defenses below that were rejected by the district court and the court of appeals: (1) the "jurisdictional issue" had not been properly exhausted, and (2) the tribal court was an indispensable party. Pease has not sought review of either question.

been abrogated by the incorporation of either into the federal union.

While the Court in *Nevada v. Hall*, 440 U.S. 410 (1979), held that there is no rule implicit in the constitutional structure which would protect one State from unconsented suit in the courts of another State, the reasoning of that decision supports the conclusion that there *is* such a constitutionally based rule in a case such as this. If tribal courts are free to independently determine whether to honor a State's immunity, it would threaten to frustrate the federal government's laws and policies as well as the States' sovereign functions.

REASONS FOR DENYING THE WRIT

Pease argues that, since the Ninth Circuit relied on the Eighth Circuit's decision in *Strate*, and since this Court granted certiorari to review the same, a "grant, vacate and remand" order ("GVR") is appropriate regardless of which way *Strate* comes out. Pease suggests that if this Court affirms the Eighth Circuit's decision, he be allowed another opportunity to distinguish this case from *Strate*. (Pet. at 4.) If this Court reverses the Eighth Circuit's decision, Pease contends he should be allowed an opportunity to "change the position taken by the panel below." (Pet. at 5.)

A GVR is appropriate only when there are intervening circumstances that would make a difference in the outcome of the case. *E.g., Lawrence v. Chater*, 116 S. Ct. 604, 607 (1996) (per curiam). Even assuming arguendo that this Court holds in favor of tribal court jurisdiction

in *Strate*, the County possesses an additional defense to tribal court jurisdiction not addressed by the court of appeals: common law sovereign immunity. That immunity has already been recognized by other lower courts (*see e.g., Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed* (9th Cir. July 18, 1996) (No. 96-35766)), and is sufficient to sustain the decision below independent of the issues which Pease raises in his petition or which are likely to be addressed in *Strate*.[4]

A. States and Their Political Subdivisions Possess Common Law Sovereign Immunity From Suit in the Tribal Courts.

At the time of the Constitution's ratification the States enjoyed a broad common law immunity from suit. As recently as last term, this Court thus explained that *Hans v. Louisiana*, 134 U.S. 1 (1890), "found its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations' [which held that] sovereign immunity 'is the general sense and the general practice of mankind.' " *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1130 (1996); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (explaining that Indian tribes' sovereign immunity flows from the same "common law immunity from suit traditionally enjoyed

---

[4] As the prevailing party, the County is entitled to defend the court of appeals' judgment on any ground the latter had before it, whether or not it was relied upon, rejected, or ignored, as long as that ground is not inconsistent with the judgment. *E.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).

by sovereign powers"); *In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992), *cert. denied sub nom. Richardson v. Mount Adams Furniture Co.*, 510 U.S. 1039 (1994) (same). A State's interest in immunity "encompasses not merely whether [it] may be sued, but *where* it may be sued" (*Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis added)), and at common law extended to a State's political subdivisions "when acting in [a] 'governmental' or 'public' capacity." *Owen v. City of Independence*, 445 U.S. 622, 645 (1980).[5] "Sovereign immunity exists to preserve the resources of the government and to protect [it] from undue influence by the judiciary." *Gilham*, 932 F. Supp. at 1219, *citing Edelman v. Jordan*, 415 U.S. 651 (1974).

---

[5] Even if Eleventh Amendment principles are used to determine whether the County is entitled to assert the State's immunity it is clear that, at least for present purposes, it would qualify as an "arm of the state." *See generally Regents v. Doe*, No. 95-1694, 1997 WL 65561 (U.S. Feb. 19, 1997). The property tax at issue is established under state law. *See* Mont. Code Ann. § 15-10-101 (1995). While the County is authorized to set mill levies for one portion of the tax, the bulk of it is set by the Montana Legislature and other local governmental entities. In collecting and disbursing the property tax the County is acting as an agent of the State (*see id.* §§ 15-16-101 to -803 (1995)), and its amenability to suit under state law is specifically proscribed. *Id.* §§ 15-1-405 and -406 (declaratory and injunctive relief against tax collection); *id.* § 15-15-101 (administrative appeal of tax assessment). Finally, any loss of tax revenue due to an inability to enforce the tax impacts the State and other governmental entities as much as it does the County. The "essential nature and effect" (*Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 576 (1946)) of the action at issue here is that of the State.

As the lower court in *Gilham* also noted, while the Eleventh Amendment does not textually address the question presented in this case, it is nevertheless relevant because of the principles animating its adoption. 932 F. Supp. at 1219-20. This Court has been quite clear in its view that the States' common law sovereign immunity was confirmed – not created – through adoption of the Eleventh Amendment. That amendment

> since *Hans* . . . [has been] understood . . . to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991); *accord Seminole*, 116 S. Ct. at 1130; *Pennhurst*, 465 U.S. at 98.

It defies logic to suggest that, notwithstanding the States' jealous regard for their freedom from suit in federal court, either the "plan of the convention" or the contemplation of the Framers left room for Indian tribes, as "domestic dependent nations," to exercise a form of jurisdiction their guardian could not. The quixotic nature of a contrary claim is exemplified best in this Court's rejection of the notion "that the States had waived their [Eleventh Amendment] immunity against Indian tribes when they adopted the Constitution" (*Blatchford*, 501 U.S. at 781) in the same fashion as they had with respect to one another:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of the concession. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suit by States, . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender ***the tribes'*** immunity, for the benefit of the ***States***, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 782 (citation omitted). By necessary implication, if the States did not waive their immunity against tribes for Eleventh Amendment purposes, they did not do so for other purposes. *Gilham*, 932 F. Supp. at 1222 (noting that it made no sense to conclude "that the states would surrender their immunity to Indian tribes without a mutual concession from the tribes").

B. An Immunity Rule Must Be Considered Implicit Within the Constitutional Structure in Order to Protect Congress's Plenary Powers, and the State's Sovereign Interests, From Being Frustrated by Actions Brought in Tribal Courts.

Beyond the question whether States possess common law immunity from suit in tribal courts is whether the latter are bound under the Constitution to respect the same. This Court's analysis of the similar question presented in *Nevada v. Hall*, 440 U.S. 410 (1979), points ineluctably to the conclusion that tribal courts are constitutionally disabled from independently determining whether to respect or ignore a State's immunity.

Nevada v. Hall involved the question whether the constitution imposed a limitation on the ability of California courts to entertain an action alleging negligence by an employee of the State of Nevada while operating a motor vehicle in California. A six-member majority of the Court rejected Nevada's main contention that California was obligated under the Full Faith and Credit Clause to recognize limits imposed under Nevada law with respect to claims of this nature. *Id.* at 424. With respect to Nevada's alternate argument that the constitutional structure itself required such a limitation, the Court concluded that the Tenth Amendment militated against finding that "unstated limitations on state power were intended by the Framers." *Id.* at 425.

In so holding the Court was careful to point out that "California's exercise of jurisdiction ***in this case*** poses no substantial threat to our constitutional system of cooperative federalism," since "[s]uits involving traffic accidents outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." *Id.* at 424, n.24 (emphasis added). The Court thus had "no occasion . . . to consider whether different state policies, either of California or Nevada, might require a different analysis or a different result." *Id.*

Were Indian tribes States, *Nevada v. Hall* would arguably be controlling. They are not. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). Because of that their inherent sovereignty has been presumptively limited to matters essential to protecting tribal self-government or regulating internal matters among members. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality

op.). More important for present purposes, tribes cannot lay claim to a status coequal with that of States: While they have a form of sovereignty, it differs qualitatively from that underlying the Court's analysis in *Nevada v. Hall*.

The scope of a State's common law immunity from suit in tribal court, and the latter's power to independently determine the same, instead must be resolved against the unique constitutional and historical considerations attendant tribal sovereignty. In this regard, then-Justice Rehnquist's dissent in *Nevada v. Hall* is significant because, like his majority opinion in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), issued a year before, it emphasized the need to resolve the adjudicatory jurisdiction issue with careful attention to the historical backdrop against which the constitution was adopted and the need to be "sensitive to the constitutional plan and avoid a result that destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries." 440 U.S. at 441.

1. Tribal Court Jurisdiction Over States Threatens to Frustrate the Constitutional Structure for Regulating Indian Affairs.

Under the Articles of Confederation the federal government was given "the sole and exclusive right and power of . . . regulating the trade, and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated." Arts. Confed'n art. IX, ¶ 4, cl. 3. However, as Chief Justice Marshall

observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), "[t]he ambiguous phrases which follow the grant of power to the United States[] were so construed by the States of North Carolina and Georgia as to annul the power itself."

As a result of this "unsettled construction of the confederation," the 1787 Constitutional Convention "omitted those qualifications which embarrassed the exercise [of Continental Congress's power over Indian affairs] as granted in the confederation." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 19 (1831). The modification reflected the position advocated by James Madison, who argued that the problems inhering in the Articles could only be remedied by centralizing the power to deal with Indian tribes in the central government:

> The regulation of commerce with the Indian tribes is very properly unfettered from the two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. . . . And how the trade with Indians, though not members of a State, and yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case where the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with a compleat sovereignty in the States; to

> subvert a mathematical axiom, by taking away a part and letting a whole remain.

The Federalist No. 42, at 284-85 (James Madison) (Jacob E. Cooke ed., 1961). The "agreement within the convention that Indian affairs should be left in the hands of the federal government" (Francis Paul Prucha, *American Indian Treaties* 69 (1994)) thus gave rise to the Indian Commerce Clause, which was intended to divest States of "virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe,* 116 S. Ct. at 1126; *see also Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 234 (1985) ("[w]ith adoption of the Constitution, Indian relations became the exclusive province of federal law").

Underlying this transfer of power from the States to the federal government was the belief that Indian affairs did not admit readily to individual state control. While not completely foreclosed (*California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 214-16 (1987)), state power over Indian tribes and their instrumentalities was thus severely limited. This transfer of power, however, had as its reciprocal Congress's plenary power over tribes. *E.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989); *Washington v. Confederated Bands & Tribes of Yakima Nation,* 439 U.S. 463, 501 (1979). Given the history and purpose of the Indian Commerce Clause it is simply inconceivable to conclude that the Framers envisioned – as being compatible with the "constitutional plan" – that Indian tribes would retain any authority or jurisdiction

over States, or that tribal courts would possess jurisdiction over States greater than that of the federal courts themselves.[6]

This case is a good illustration of how tribal court jurisdiction may frustrate congressional policy. In *County of Yakima* this Court concluded that Congress had intended in the General Allotment Act to remove restrictions on State taxation of Indian allotments which were alienable. 502 U.S. at 264. In *Lummi* the Ninth Circuit Court of Appeals extended that reasoning to all alienable lands regardless of how they were patented. 5 F.3d at 1358. Characterizing this Court's reasoning as "strained" (Pet. App. at 32a) and the Ninth Circuit's decision as "overreaching" (Pet. App. at 32a), the Crow Court of Appeals held that neither of those cases applied on the Crow Reservation (Pet. App. at 32a-33a).

Given that there is no recourse from the tribal court's mandate on anything other than jurisdictional questions (*see Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)), if tribal court jurisdiction is found to exist here it would

---

[6] As this Court has observed, the Framers simply did not contemplate the types of tribal powers asserted here. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 10, 17 (1987) ("[t]ribal courts in the Anglo-American mold were virtually unknown in 178[illegible] when Congress first authorized diversity jurisdiction"); *Oliphant*, 435 U.S. at 197 ("until the middle of this century, few tribes maintained any semblance of a formal court system"); *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (Framers simply did not have tribes "in view" when extending federal court jurisdiction to controversies between States or citizens thereof and foreign states, citizens or subjects).

appear that federal laws – and this Court's decisions – may be subject to differing final interpretations on, off, and among Indian reservations. Such a result would frustrate Congress's and this Court's efforts to ensure consistency and uniformity in federal law, would create the specter of forum shopping, and would aggravate inter-jurisdictional conflicts.

2. Tribal Court Jurisdiction Over States Is Without Historical Precedent and Threatens to Frustrate State Sovereign Interests.

The historical backdrop underlying the adoption of the Eleventh Amendment and the Indian Commerce Clause make the Court's analysis in *Oliphant* and *Duro v. Reina*, 495 U.S. 676 (1990), particularly apposite. In those cases the Court held that non-Indians and Indian non-members are not subject to tribal criminal jurisdiction. The Court relied in part on the absence of historical precedent for extending tribal criminal jurisdiction over nonmembers. *Oliphant*, 435 U.S. at 197-206; *Duro*, 495 U.S. at 690-93. The same lack of precedent exists with respect to tribal jurisdiction over States – a vacuum easily explained by the traditional immunity of States from suit in any court without their consent and the notion that it was not tribes, but Congress, which was vested with the power to regulate state activity in Indian country.

Beyond a lack of historical pedigree for the result sought by Pease, however, is another similarity with *Oliphant* and *Duro*: the incongruity of recognizing tribal authority whose scope is unrestrained by the constitution. The *Duro* Court thus stressed the conclusion reached

in *Oliphant* that the "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." 495 U.S. at 693. It noted further the differences between tribal adjudicatory forums and state or federal ones, including their typical subordination to the political branch, possible reliance on "unspoken practices and norms," and the inapplicability of the Bill of Rights. *Id.* The last of these differences was the most significant because "[o]ur cases suggest constitutional limitations on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.*

While the specific Bill of Rights considerations at issue in *Oliphant* and *Duro* are not relevant here, the Tenth Amendment counsels a similar bright-line rule insofar as tribes attempt to regulate state activities in Indian country. It beggars credulity to conclude that tribes have comparable, much less greater, powers vis-á-vis the States than their sovereign – especially in light of a constitutional plan under which that sovereign's own powers derive from the States' agreement to divest themselves of authority for purposes of forming a national government. *See, e.g., New York v. United States,* 505 U.S. 144, 162 (1992) ("[t]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instructions"); *Nevada v. Hall,* 440 U.S. at 434 (Rehnquist, J., dissenting) (observing that *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), invalidated the States' right to tax the federal

government even absent an express constitutional prohibition because "the power to tax is the power to destroy, and . . . to concede the States such power would place at their mercy the Constitution's affirmative grants of authority to the Federal Government – a result the Framers could not have intended").

No question exists that the exercise of tribal court jurisdiction over a State or its political subdivisions can significantly affect the conduct of their sovereign functions. Indeed, it is hard to conceive of a more direct intrusion than the one presented here. Both Congress and the federal courts have consistently recognized "the need to avoid even indirect interference with the state-established procedures for the collection of taxes and the adjudication of disputes concerning the legality of those taxes." Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 121 (1988). Numerous federal statutory and judicial policies strongly favor – if not mandate – state court determination of state tax matters in the first instance. *See, e.g.*, Tax Injunction Act, 28 U.S.C. § 1341 (federal courts prohibited from issuing injunction against collection of state taxes where state remedies available); *Great Lakes Dock & Dredge Co. v. Huffman*, 319 U.S. 293 (1943) (declaratory relief involving state tax matters prohibited); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (damage actions under 42 U.S.C. § 1983 not available against state tax assessors). The tribal court's decision here, and the similar decisions that are likely to follow if this one were to be sustained, place an intolerable burden on one of the County's core governmental functions.

It is in this respect that footnote 24 in *Nevada v. Hall* again becomes significant. Unlike the situation in that case, exercise of tribal court jurisdiction here directly relates to the discharge of core governmental responsibilities. This case presents a controversy falling squarely within the purview of footnote 24 and would, even were two States involved, raise issues over the "federalism constraints on a State's amenability to suit in the courts of another State" referred to by Justice Blackmun in his dissent. 440 U.S. at 431. There can be no real dispute that the majority opinion, by expressly leaving these issues open, did not hold that the immunity defense would always be unavailable since, as Justice Blackmun also observed, the footnote implicitly means that "***some*** state policies might require a different result" and that "the only question is whether the facts of this case are sufficient to call the implicit constitutional right of sovereign immunity into play here." *Id.* (emphasis added). The majority's caution in that regard was justified. In contrast to *Nevada v. Hall*, where the Court found a constitutional rule of immunity lacking, here those same reasons militate in its favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

JOSEPH P. MAZUREK
Attorney General of Montana
HARLEY R. HARRIS
Assistant Attorney General
Counsel of Record
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406)444-2026

February 1997

Russell C. Fagg
DEPUTY YELLOWSTONE COUNTY ATTORNEY
Room 701, Courthouse
P.O. Box 35025
Billings, Montana 59107-5025
Telephone: (406)256-2870

CROW TRIBAL COURT

IN AND FOR THE CROW TRIBE OF INDIANS

CROW AGENCY, MONTANA 59022

CARL PEASE, Plaintiff, vs. YELLOWSTONE COUNTY, Defendant.	)	Civil No. 91-209 STIPULATED FACTS

Carl Pease, Plaintiff, and Yellowstone County, Defendant, stipulate to the following facts in this matter:

1. Plaintiff's father, George Pease Jr., received the property in question on July 26, 1923, as part of the 1920 Allotment. George Pease Jr. received a fee simple patent title to the property. Mr. Pease received the property "together with all the rights, privileges, immunities, and appurtenances . . . forever . . . " A copy of the deed giving title of this land to George Pease is attached to Defendant's Brief in Support of its Cross Motion For Summary Judgment as Exhibit "1".

2. The Plaintiff, Carl Pease, failed to pay his first and second half taxes on the land from 1987 to

the present. Yellowstone County attempted to issue a tax deed to the property, but this action was filed which temporarily enjoined Yellowstone County from receiving tax deed to the property.

3. Plaintiff, Carl Pease, is a member of the Crow Tribe, and the land in question lies within the boundaries of the Crow Reservation. The Plaintiff acquired the land in question from his father, George Pease, Jr. There is no record that George Pease, Jr. ever requested a fee patent to this land.

Dated this ___ day of February 1994.

/s/ Russell C. Fagg
Russell C. Fagg
Deputy Yellowstone County Attorney
Attorney for Defendant

/s/ D. Michael Eakin
D. Michael Eakin,
Attorney for Plaintiff
Montana Legal Services,
2442 First Avenue North
Billings, MT 59101 on ___